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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-346

WILLIAM N. ANDERSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 481 F. 2d 685.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1973. On July 13, 1973, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 25, 1973. The petition was filed on August 24, 1973, and was granted on December 10, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a conspiracy to have false votes cast, counted and certified for all candidates on a particular

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slate, including candidates for federal and local office, violates 18 U.S.C. 241, where the principal objective of the conspiracy is to affect the election for a local office.

2. Whether the indictment in this case sufficiently alleged that petitioners were acting "under color of state law."

STATUTE INVOLVED

Section 241 of Title 18, United States Code, provides, in pertinent part:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same * * *
>
> * * * * * *
>
> They shall be fined not more than $10,000 or imprisoned not more than ten years, or both * * *.

STATEMENT

Petitioners were indicted on January 12, 1971, for an alleged violation of 18 U.S.C. 241. The indictment (Pet. App. B) charged a conspiracy by the defendants, all identified in the indictment as state or county officials,[1] and unnamed co-conspirators,[2] to

[1] William Anderson was identified as the Clerk of the County Court of Logan County; John Browning as the Clerk of the Circuit Court of that County; Earl Tomblin as the Sheriff of Logan County; Ernest "Red" Hager as a Deputy Sheriff of that County; and W. Bernard Smith as a State Senator for the Seventh Senatorial District (Pet. App. B, p. 1b).

[2] The evidence established, and the trial judge charged, that certain named election officials and others were co-conspirators (A. 59–60).

cast false and fictitious votes for federal, state and local candidates in a primary election.[3]

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[3] The indictment alleged in part (Pet. App. B, pp. 1b–3b):

* * * * *

"6. On the 12th day of May, 1970, pursuant to the laws of the United States and of the State of West Virginia, a primary election was held within the State of West Virginia, for the purpose of nominating candidates for the offices of United States Senator, Representative to Congres, and various state and county public offices.

* * * * *

"9. From on or about the 1st day of May, 1970, and continuing until on or about the date of this indictment, in Logan County, West Virginia, within the Southern Judicial District of West Virginia, WILLIAM M. ANDERSON, JOHN R. BROWNING, ERNEST L. "RED" HAGER, W. BERNARD SMITH, and EARL TOMBLIN, the defendants herein, did unlawfully, wilfully and knowingly conspire together and with each other, and with divers other persons known and unknown to the grand jury, to injure and oppress the aforesaid qualified voters in the free exercise and enjoyment of certain rights and privileges secured to them, and to each of them, by the Constitution and laws of the United States and particularly the right of suffrage, that is to say, the right to vote for candidates for the aforesaid offices and to have such vote cast, counted, recorded, and certified at their full value and given full effect as aforesaid.

"10. It was a part of said conspiracy that the defendants did cause and attempt to cause votes to be cast in the said Mount Gay precinct by procedures and methods in violation of the laws of the State of West Virginia, and to cause fraudulent and fictitious votes to be cast in said precinct, all with the purpose and intent that said illegal, fraudulent, and fictitious ballots would be counted, returned and certified as a part of the total vote cast in said primary election, thereby impairing, lessening, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast in said primary election in Logan County, West Virginia; all of which was done in violation of Title 18, United States Code, Section 241."

After a jury trial the defendants, all petitioners here, were convicted. Each was provisionally sentenced to the maximum term of imprisonment under 18 U.S.C. 241 (ten years), as required by 18 U.S.C. 4208 (b) pending the results of studies pursuant thereto.[4] The court of appeals affirmed (Pet. App. A).

On May 12, 1970, a primary election was held in West Virginia for the purpose of nominating candidates for the United States Senate, United States House of Representatives and various state and local offices. Prior to the election, the petitioners, in conjunction with three election officials, Calvin Napier (Republican Election Clerk), Cecil Elswick (Republican Election Commissioner), and Janet Sullins (Democratic Election Clerk), conspired to obtain control of the Mount Gay precinct in Logan County, by having the "house set up"[5] (A. 25; Tr. 1173–1174),[6] *i.e.*, by gaining the connivance of all officials at one polling place in an attempt to bring about the election, illegally if necessary, of one political faction (A. 25; Tr. 347, 1146). In this instance the Mount Gay precinct was "set up" in an effort to insure the nomination of all the candidates, state and federal, running

[4] The resentencing contemplated by 18 U.S.C. 4208(b) does not occur until the defendant has served three months of the provisional sentence, during which period the study is made. Since petitioners have remained free on bail and have not yet been incarcerated, they have not yet been resentenced.

[5] "House" refers to the precinct house or voting place, here the Mount Gay schoolhouse.

[6] "Tr." refers to the transcript of proceedings in the district court (a certified copy of which has been filed in this Court).

on one of the Democratic primary slates (A. 39–41, 43–45; Tr. 1143–1147, 1418–1419).

In Logan County, one of the nominations most prized and actively contested was for a seat on the Logan County Court.[7] Among the several Democratic candidates for the seat was the incumbent, Okey Hager, and his major opponent, Neal Scaggs. Hager and Scaggs each headed a slate or faction of candidates, which included, on one slate or the other, all the major contestants for Democratic nominations in this primary (Tr. 410–411, 1097).

The Hager slate included not only other local candidates, but also Senator Robert Byrd, whose name was on the ballot for renomination to the United States Senate, and Congressman Ken Hechler, whose name was on the ballot for renomination to the United States House of Representatives (A. 37, 39–40, 44–45). Other candidates also sought these federal nominations (see G. Ex. 2[8]).

The evidence revealed that by using the powers of their offices the petitioners convinced[9] at least the above-named three elections officials, who were operating the Mount Gay precinct on election day, to cast

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[7] In West Virginia the County Court is "the central governing body of the county" (*State ex rel. Dingess* v. *Scaggs*, 195 S.E. 2d 724, 726 (W. Va. Sup. Ct. App.)), and is vested with a wide variety of legislative, executive and judicial powers. See W. Va. Code, ch. 7, Art. 1, §§ 3, *et seq.*

[8] "G. Ex." refers to the government's exhibits introduced in evidence.

[9] The participation of the co-conspirators was secured by threats of indictment or arrest, or promises of county jobs and money (see, *e.g.*, A. 24–26, 40–44).

false and fictitious votes on the voting machines for the entire Hager slate and then to destroy the poll slips[10] so that the number of persons who had voted could not be determined except from the machine tally (A. 23–26, 39–45; Tr. 628–632). Elswick, Napier and Sullins, the three election officials who participated in the scheme, testified that, pursuant to this preconceived plan, votes were placed on the voting machines at the Mount Gay precinct benefiting all the candidates, federal, state and local, running on the Hager slate.[11]

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[10] Poll slips are consecutively numbered records reflecting the name of each person who actually voted at a precinct. See W. Va. Code, ch. 3, Art. 1, § 22.

[11] For example, Cecil Elswick, the election official who actually put the illegal votes on the machine, testified (A. 39–40, 44–45):

"Q. What went on at that meeting, that first time you met with [petitioner] Hager?

"A. Well, Red Hager told me he knew I had been appointed as a republican election officer, commissioner, to serve in the house, and he wanted me to go along with them and if I didn't that he would cause me trouble.

"Q. Did he tell you what he meant by going along with them?

"A. Go along and help win the Mount Gay precinct on election day.

"Q. For whom?

"A. For the Okey Hager slate and Senator Byrd and Ken Hechler.

"Q. Who else was on that slate, if you know?

"A. Charles Gilliam, House of Delegates; he was on it.

* * * * *

"A. I would go with her [Janet Sullins] and we had it arranged when we got in the machine with the voter we would make sure that the voter was in the middle and we was on each

The evidence established that only Elswick actually placed false votes on the machines, while Napier (A. 33; Tr. 347) and Sullins (Tr. 871, 875–876, 921) stood by and either diverted the attention of voters or merely ignored the casting of false votes as they had been told to do.

After the votes were machine-tabulated, Elswick took the poll slips to his automobile and later threw them in a river (Tr. 643–645).

While only about 250 to 275 persons actually voted at the Mount Gay precinct and the evidence showed that no more than 306 could have voted, the election

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side of the voter, and they would say this is the way they wanted to vote. I kept the slate over there with me and I just voted my slate. If they wanted to vote for Neal Scaggs, we would vote them for Okey Hager unless we thought one would catch us, and if we thought they would catch us we would vote the way they wanted to vote.

"Q. Mr. Elswick, did you put any illegal votes on those machines that day?

"A. Yes, sir, we did.

"Q. How many?

"A. I lost count at about ninety. It was over a hundred. I lost count that evening and we put more on after I lost count, so it was over 100 votes.

"Q. Who were you putting those votes on there for?

"A. I was putting them on there for Senator Byrd and Ken Hechler and Okey Hager slate, Leroy Counts, House of Delegates, Charles Gilliam, and all their slate."

Election official Janet Sullins testified that she was aware that Elswick was putting votes on for the entire "Hager slate" (Tr. 875–876); others referred to it as the "Byrd slate" (see, *e.g.*, testimony of Robert Marcum, Tr. 1418–1419), but all the evidence indicates that, regardless of nomenclature, the "slate" referred to encompassed candidates for both federal and local offices.

returns showed a total of 401 votes cast for some offices (A. 26–27, 46; Tr. 873).[12]

The certificate of the results of the Mount Gay precinct Democratic primary (G. Ex. 2) indicated that, among other totals, Senator Byrd received 342 votes, Congressman Hechler 314 votes, Okey Hager 294 votes and Neal Scaggs 67 votes.[13] The county-wide totals in the Hager-Scaggs race, including the Mount Gay votes, gave Hager a margin of victory of only 21 votes. Thus, without the 227-vote margin in the Mount Gay precinct, Hager would have lost his bid for renomination.

After the winners of the primary had been certified on May 27, 1970, certain returns (not including the

[12] At the time of the election the records of the Logan County Court listed 541 persons as eligible to vote at the Mount Gay precinct (G. Exs. 1, 2, 4A, 4B). Of the 541 eligible, 88 testified at the trial that they did not vote in the election, and it was agreed that 134 other persons whose names were read to the jury were registered voters at the Mount Gay precinct who, if called as witnesses, would testify that they did not vote in the election. Nine registered voters were dead at the time of the election, two were in the hospital and two were in prison. (Tr. 43–80, 107–121, 129–200, 264–337, 506, 812–820.) Thus, at least 235 registered voters did not go to the polls at Mount Gay on May 12, 1970. In addition, eighteen registered voters in that precinct voted by absentee ballot (Tr. 83), which left a maximum of 288 registered Mount Gay voters who could have gone to the polls in this election, and a maximum of 306 who could have voted. This established beyond question that the reported figures were fraudulent.

[13] The fact that the federal candidates each received more votes than could legally have been cast establishes conclusively that they received fraudulent votes which were counted and certified in the county totals. The difference between their total votes and the votes for Hager could reflect split-ticket voting by some who voted for Scaggs.

votes for the federal candidates in the Mount Gay precinct) were disputed in an election contest case brought by Scaggs in state court. Evidence presented at trial in the instant case showed that petitioners perjured themselves and solicited other witnesses to testify falsely on behalf of the Hager faction in that state election contest case, all in a continuing effort to have the fraudulent votes counted and certified (A. 28–32, 37–39, 46–50, 52–53). The Mount Gay votes, including those illegally cast, were ultimately counted, and Okey Hager was nominated for the County Court seat in dispute.[14] The votes cast in the Mount Gay precinct for the federal candidates, which were not challenged, were also counted, although in neither federal race did they affect the result.

In affirming petitioners' convictions, the court of appeals held that the indictment sufficiently alleged a conspiracy to cast false votes in elections for federal offices, *inter alia,* and hence stated an offense in violation of 18 U.S.C. 241. In rejecting a belated claim

[14] The election suit, at which candidate Hager was one of two presiding judges (Tr. 490, 1038), was concluded on August 25, 1970. Although the court was required by statute to rule on the contest by September 17, 1970 (see W. Va. Code, ch. 3, Art. 7, § 7), it failed to enter a final order within the statutory period and, indeed, never officially decided the election contest.

Scaggs appealed to an intermediate appellate court, which eliminated the entire vote results of the Mount Gay precinct (and thus in effect awarded the nomination to Scaggs). The Supreme Court of Appeals of West Virginia thereafter ruled that the intermediate appellate court had had no jurisdiction to act with regard to the contest since no decision had been made by the state trial court within the statutory time allowed. *State ex rel. Hager* v. *Oakley*, 177 S.E. 2d 585.

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by petitioners that evidence concerning the state election contest was inadmissible because a conspiracy to affect only a state or local election was beyond the reach of Section 241, the court also concluded that Section 241 prohibits a conspiracy to cast false votes in such elections, at least where the conspiracy involves "state action" or action "under color of law" (Pet. App. 23a). On the record in this case, the court found sufficient evidence of such action.

SUMMARY OF ARGUMENT

In our view, this Court need not reach any novel question in this case because the indictment alleged and the evidence showed that one of the purposes of the conspiracy here was the casting and counting of fraudulent votes in the election of candidates for federal offices. Under long-established principles, such activity is prohibited by Section 241 (see, *e.g., United States* v. *Saylor,* 322 U.S. 385; *United States* v. *Classic,* 313 U.S. 299), even if the principal purpose of petitioners' conspiracy was to cast and have counted fraudulent votes for local candidates running on the same tickets. *Ingram* v. *United States,* 360 U.S. 672.

In any event, the court of appeals was correct in holding that Section 241 also prohibits conspiracies, involving state action, to cast false votes in state or local elections. The right to vote in such elections, free from invidious discrimination, is protected against state action by the Fourteenth Amendment, and under this Court's decisions in *United States* v. *Guest,* 383 U.S. 745, and *United States* v. *Price,* 383

U.S. 787, the protection of Section 241 extends to all rights secured by that Amendment. Petitioners' historical arguments to the contrary have been repeatedly rejected by this Court, in applying Section 241 both in the context of interference with voting rights and in other contexts.

Although in our view the Court need not reach the issue, we also contend that the indictment in this case adequately alleged action under color of state law. It alleged a conspiracy to affect both federal and local vote results by means of activities which necessarily implicated involvement by state election officials; and it also alleged the state office held by each of the petitioners. Under the standards applied by this Court in *Guest, supra,* 393 U.S. at 754–757, these allegations were sufficient.

ARGUMENT

I. SECTION 241 WAS VIOLATED BY THE PETITIONERS' CONSPIRACY TO CAST FALSE VOTES FOR BOTH FEDERAL AND LOCAL CANDIDATES RUNNING ON A PARTICULAR PRIMARY SLATE

Petitioners' entire argument in this Court is based on the contention that the sole purpose of their conspiracy was to cast fraudulent votes for a local candidate, and that they therefore were improperly charged with a federal offense under 18 U.S.C. 241. Indeed, petitioners concede that if the conspiracy had been directed at "the casting of fraudulent ballots for both state and federal offices" (Br. 7–8), Section 241 would reach it. In our view, that concession is both legally correct and factually dispositive of the case, since the record shows that the conspiracy here was precisely

of that nature. Accordingly, the Court need not, and should not, reach petitioners' principal contention—with which we disagree—that Section 241 does not apply to a conspiracy solely to cast false votes in a state or local election.

A. A CONSPIRACY TO CAST FALSE VOTES FOR CANDIDATES RUNNING ON THE SAME SLATE FOR BOTH FEDERAL AND LOCAL OFFICES VIOLATES SECTION 241 EVEN IF THE LOCAL OFFICES ARE THE PRINCIPAL CONCERN OF THE CONSPIRACY

The indictment in this case alleged, and the evidence established, that one of the purposes of the petitioners' conspiracy was to have false votes cast, counted and certified in the primary election of candidates for federal office. Thus, the indictment, after referring expressly to the holding of a primary election for both federal and state offices (Pet. App. 1b–2b), charged the petitioners with having conspired to interfere with the right of qualified voters to vote "for candidates for the *aforesaid offices*" (Pet. App. 3b; emphasis added). In its opening statement the government said it would prove that the fictitious votes at issue in the case included votes for candidates for federal office (A. 23), and, as recounted in the Statement, *supra*, substantial evidence to this effect was put before the jury.

For example, Cecil Elswick, the election commissioner who actually placed the fraudulent votes on the voting machine (see pp. 6–7, *supra*), testified that he was threatened with trouble by one of the petitioners if he did not "go along with them" in the casting of votes for nominees to both federal and state offices (A. 39–40) and that he did in fact cast more than 100 false votes for both federal and state nominees in the Mount

Gay precinct (A. 44–45). The evidence thus showed that local and federal candidates were joined on a common slate, that the conspiracy was directed toward the casting and counting of false ballots for the entire slate, and that the activities conducted in furtherance of the conspiracy included the actual casting of false votes for federal as well as local candidates (see pp. 6–7, *supra*, n. 11). This, we submit, established a classic violation of Section 241 under this Court's cases.

It has long been settled that a conspiracy to dilute the value of the votes of qualified voters, by means of ballot box stuffing, at an election for federal offices is a violation of Section 241 (*United States* v. *Saylor*, 322 U.S. 385; see, also, *United States* v. *Mosley*, 238 U.S. 383) and that Section 241 applies to primary, as well as general, elections for federal offices (*United States* v. *Classic*, 313 U.S. 299; *Klein* v. *United States*, 176 F. 2d 184 (C.A. 8), certiorari denied, 338 U.S. 870; see *Smith* v. *Allwright*, 321 U.S. 649, 659–660). And the fact that the outcome of the federal election may not actually have been altered by the acts done in furtherance of the conspiracy is immaterial:

> The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest [count] * * * is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States.

Prichard v. *United States*, 181 F. 2d 326, 331 (C.A. 6), affirmed due to absence of quorum, 339 U.S. 974. See also *United States* v. *Saylor, supra*, 322 U.S. at 389; *Fields* v. *United States*, 228 F. 2d 544, 547 (C.A. 4), certiorari denied, 350 U.S. 982; *United States* v. *Skurla*, 126 F. Supp. 713, 717 (W.D. Pa.).

It is, of course, commonplace for elections to be held simultaneously for state and federal offices, and numerous decisions have sustained the application of Section 241 (*Devoe* v. *United States*, 103 F. 2d 584, 586–587 (C.A. 8), certiorari denied, 308 U.S. 571; *Shannabarger* v. *United States*, 99 F. 2d 957, 958–960 (C.A. 8); *United States* v. *Pleva*, 66 F. 2d 529, 530 (C.A. 2); cf. *United States* v. *Nathan*, 238 F. 2d 401, 403, 409 (C.A. 7), certiorari denied, 353 U.S. 910) or of other federal criminal statutes (*Blitz* v. *United States*, 153 U.S. 308, 313–314; *In re Coy*, 127 U.S. 731, 751–755) where fraudulent votes have been cast for both the federal and the state or local candidates on the ballot.

Finally, petitioners acknowledge, as they must, that a conspiracy may have several purposes (Br. 7–8) and that it is sufficient if only one of the purposes would violate Section 241. However, their contention that the only purpose of their conspiracy was to affect the nomination for a local office is, as we have seen (*supra*, pp. 4–8, 12–13), contrary to both the allegations of the indictment and the evidence—which showed that the scheme also included the casting of false votes for the federal offices.

Apparently, petitioners' contention is that, although their scheme involving the casting of false votes for all candidates on the Hager ticket meant that they would

knowingly have false votes cast and counted for both federal and state candidates, their *motive* in doing so was solely to affect the outcome of the local contest. Although petitioners introduced no evidence specifically showing that this was their reason for conspiring to have false votes cast for the federal candidates, it is entirely plausible that they would have believed that stuffing more than 100 false ballots in a single precinct for the local candidates would have been too conspicuous and too likely to arouse suspicion in the absence of the casting of a similar number of false votes for the federal candidates as well. But even if this was their motive for conspiring to cast false votes for federal candidates,[15] we fail to see why this would be a

[15] The court of appeals' statement, relied upon by petitioners, that the "true object and purpose" of the conspiracy was to secure Hager's nomination for County Judge (Pet. App. 18a) was made in the course of a discussion, in connection with an evidentiary question, of the continuing nature of the conspiracy, which was to last until the fraudulent votes "were finally given effect in the election result * * *." *Ibid.* The court held that the evidence was properly admissible because the conspiracy was not limited to the purpose of merely casting fraudulent votes but extended also to the purpose of having those votes be given effect. Since the entire theory of the case—reflected in the indictment, the evidence and the instructions to the jury (and petitioners made no objection to the instructions in this regard)—was that there had been a single conspiracy to have false votes cast and counted for the Hager slate of federal and false candidates, the evidence of acts done in furtherance of the conspiracy's objectives during the continuing contest over the state results (after the federal results had been certified and were not being contested) was, we submit, properly admissible without any need for the court of appeals to decide whether Section 241 applies to conspiracies confined to state elections. See *Lutwak* v. *United States*, 344 U.S. 604, 617–618; *Devoe* v. *United States*, *supra*, 103 F. 2d at 587–589. The petition for

defense, under any theory, to the charge under Section 241—any more than it would be a defense to a charge of conspiring to rob a federally insured bank that the conspirators intended to use the proceeds solely to bribe voters in an election for local office (cf. *United States* v. *Bathgate,* 246 U.S. 220).[16]

Indeed, the essence of petitioners' position was rejected by this Court in a similar context in *Ingram* v. *United States,* 360 U.S. 672, 679–680:

> Here, the criminality of the enterprise under local law provided more than sufficient reason for the secrecy in which it was conducted. A conspiracy, to be sure, may have multiple objectives, *United States* v. *Rabinowich,* 238 U.S. 78, 86, and if one of its objectives, even a minor one, be the * * * [violation of federal law], the offense is made out, though the primary objective may be concealment of another crime.[17]

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certiorari in this case presents no question concerning the admission of this evidence (although it does, of course, challenge the theory on which the court of appeals chose, unnecessarily in our view, to sustain its admissibility).

[16] This Court, in *In Re Coy, supra,* rejected a contention that an indictment under two sections of the Enforcement Act was defective because, although it charged a conspiracy to keep illegally the returns of elections for both state and federal offices, it did not charge that the defendants intended to falsify or otherwise tamper with the returns for the federal office. 127 U.S. at 753–755. As the Court explained in *Blitz* v. *United States, supra,* 153 U.S. at 313–314, the federal provision designed to prevent the possibility of fraud in federal elections was appropriately applied in *Coy,* even if "the only purpose of the conspirators may have been to obtain the custody of such returns for the purpose of fraudulently changing them so far as they applied to certain state officers." *Id.* at 313.

[17] The "other crime" referred to in *Ingram* was viewed by the Court as one subject to prosecution by local authorities. 360 U.S. at 680.

Under the authority of *Ingram*, and the evidence adduced, petitioners' convictions were properly based on their having conspired to dilute votes in two federal election contests. Since this Court's decisions in *Saylor* and *Classic, supra*, establish that Section 241 prohibits such conduct and that, as so applied, the statute is a proper exercise of the long-recognized congressional power to protect the integrity of federal elections (see *Ex parte Yarbrough*, 110 U.S. 651; *Burroughs* v. *United States*, 290 U.S. 534), there is no need in this case for the Court to decide any novel question.[18]

B. IN ANY EVENT, THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT SECTION 241 ALSO PROHIBITS CONSPIRACIES, INVOLVING STATE ACTION, TO CAST FALSE VOTES IN STATE OR LOCAL ELECTIONS

While for the reasons previously explained we believe it was unnecessary for the court of appeals to decide the question in this case, we agree with the court's holding that Section 241 prohibits "conspiracies, involving state action at least, to dilute the effect of ballots cast for the candidate of one's choice in wholly state elections" (Pet. App. 24a), and we agree generally with the court's legal analysis (Pet. App. 20a–24a) in reaching that conclusion.

1. Petitioners' contention that Section 241 cannot be applied to a conspiracy concerning only state or local vote fraud rests upon the type of narrow construction of Section 241 and its predecessors which was squarely rejected in *United States* v. *Guest*, 383 U.S. 745, and *United States* v. *Price*, 383 U.S. 787,

[18] See n. 15, *supra*.

where this Court most recently considered the history and scope of Section 241.

In *Price*, this Court stated (383 U.S. at 801):

> We think that history leaves no doubt that, if we are to give § 241 the scope that its origins dictate, we must accord it a sweep as broad as its language.

In these opinions, the Court settled the questions remaining after *United States* v. *Williams*, 341 U.S. 70, as to whether Section 241 is applicable to any and all Fourteenth Amendment rights. The Court found no basis for excluding from the general language of Section 241 the rights secured by the due process clause or the equal protection clause of that Amendment. *Price, supra*, 383 U.S. at 800–806; *Guest, supra*, 383 U.S. at 753–755. As the Court stated in *Price, supra*, 383 U.S. at 805:

> We cannot doubt that the purpose and effect of § 241 was to reach assaults upon rights under the entire Constitution, including the Thirteenth, Fourteenth and Fifteenth Amendments, and not merely under part of it.

In attempting to avoid the thrust of *Guest* and *Price* and the broad language of the statute, petitioners contend primarily that Section 241, insofar as it can be read to cover voting at all,[19] must be read as limited to federal elections, because the Congress which passed the Enforcement Act deemed itself with-

[19] The historical argument against applying Section 241 to voting rights was set forth in detail in the dissenting opinions in *Mosley*, *supra*, 238 U.S. at 388–393; *Classic*, *supra*, 313 U.S. at 331–341; and *Saylor*, *supra*, 322 U.S. at 390–393, and was decisively and, we submit, conclusively rejected by the Court in those cases.

out power to reach conduct affecting state and local elections which did not involve racial discrimination (Br. 10–17).

In making this argument, petitioners concede, as they must, that Congress has the constitutional authority to "punish conspiracies to dilute the right to vote in state or local elections" (Br. 12). Their argument with respect to the perceptions of Congress in 1870 as to its powers necessarily assumes, however, that the Enforcement Act of 1870 was an entirely coherent, consistent and symmetrical enactment. It was not. It was a composite, hastily welded together out of disparate pieces, attributable to a variety of sponsors having particular concerns.[20]

Senator Pool, the author of Section 6 of the Act (now Section 241), had perhaps the broadest view and

[20] Thus, Sections 1–4 of the Act—which were concerned solely with the right to vote—derived from the parent bill reported by the Senate Judiciary Committee as a substitute for other voting measures before the Senate. 91 Cong. Globe, 2942, 3479–3480. Sections 16 and 17—which reenacted provisions of the Civil Rights Act of 1866 and ultimately became 18 U.S.C. 242—are traceable to an amendment submitted by Senator Stewart of Nevada. *Id.* at 3480. And Section 6—now our Section 241—, together with Section 7, was proposed by Senator Pool. *Id.* at 3612, 3679. There were many other amendments. See *id.* at 3688 (comment of Senator Trumbull). Just before the bill was finally passed, one Senator characterized it as "a conglomeration of incongruities and contradictions" and claimed no one knew its true content in light of the number of amendments hastily adopted (*ibid.*, Senator Thurman). Another member accurately stated: "The bill as it now stands is the child of many fathers. It is a piece of patchwork throughout." *Ibid.* (Senator Casserly). See, also, *United States* v. *Williams*, 341 U.S. 70, 74–75, n. 2 (opinion of Mr. Justice Frankfurter).

meant to protect all rights against all interference, including those rights recently declared by the Fourteenth Amendment, which he thought Congress might safeguard against both official and unofficial invasion.

In introducing Section 241 in its original form,[21] he explicitly referred to "rights which are conferred upon the citizen by the fourteenth amendment" as among those covered by his provision. 91 Cong. Globe 3611; *id.* at 3613. In context, it is clear that the sponsor of the provision had in mind the rights conferred by both the due process and equal protection clauses, and this Court's decisions in *Guest* and *Price* have confirmed that intention. Thus, Senator Pool's statements and the other legislative history of the adoption of the Enforcement Act of 1870 establish that the original form of Section 241 was designed to embrace "*all* of the rights and privileges secured to citizens by *all* of the Constitution and *all* of the laws of the United States." *Price, supra,* 383 at 800 (emphasis in the original).

This Court has also made it clear that Section 241 is not limited to the protection of rights recognized as being secured by the Constitution at the time of the enactment of that Section or its predecessors. Thus, in *Guest* the Court held that Section 241 applies to interference with rights which were not recognized as being secured by the Fourteenth Amend-

[21] Senator Pool's speech introducing the amendment which became Section 6 of the Enforcement Act of 1870, and ultimately Section 241, is reproduced in its entirety as an Appendix to the opinion of the Court in *Price, supra,* 383 U.S. at 807–810.

ment until relatively recently. 383 U.S. at 754, n.6.[22] As the court of appeals noted, ballot box stuffing interferes with the very core, not the periphery, of the right to vote, free from invidious discrimination, secured by the Constitution (Pet. App. 21a-22a).

2. Petitioners also contend that the entire subject of voting (whether in state or federal elections) should be excluded from the coverage of Section 241 because the problem of fraudulent voting and registrations was addressed specifically in Sections 19 and 20 of the Enforcement Act of 1870 (Br. 12–14) which provisions—since repealed (28 Stat. 36)—applied only to congressional elections. This argument, which assumes that there was no overlap between the provisions of the 1870 Act, has been dispositively rejected by this Court.

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[22] Of course, there must be the requisite specific intent to interfere with the right in question, whether it be one of long-standing or only recent recognition. See *Guest*, *supra*, 383 U.S. at 760; *Screws* v. *United States*, 325 U.S. 91, 106–107. In the instant case no question has been raised concerning the treatment of the specific intent requirement in the charge to the jury (A. 61–64). And, as in *Guest*, "the rights under the Equal Protection Clause" at issue here "have been so firmly and precisely established by a consistent line of decisions in this Court, that the lack of specification of these rights in the language of § 241 itself can raise no serious constitutional question on the ground of vagueness or indefiniteness." 383 U.S. at 754 (footnote omitted). See, *e.g.*, *Smith* v. *Allwright*, 321 U.S. 649; *Reynolds* v. *Sims*, 377 U.S. 533; *Avery* v. *Midland County*, 390 U.S. 474; *Kramer* v. *Union School District*, 395 U.S. 621; *Cipriano* v. *City of Houma*, 395 U.S. 701; *Hadley* v. *Junior College District*, 397 U.S. 50. Indeed, the stuffing of ballots by a State would also violate procedural due process. Cf. *United States* v. *Atkins*, 323 F. 2d 733, 743 (C.A. 5).

Thus, in *United States* v. *Mosley, supra,* and *United States* v. *Saylor, supra,* the Court concluded, after full consideration, that vote fraud conspiracies concerning congressional elections were covered by Section 241 even though they had been specifically covered by the repealed Sections 19 and 20 of the 1870 Act. See, also, *United States* v. *Classic, supra,* 313 U.S. at 322, n. 5.

Similarly, in *Price* the Court concluded that certain activities covered by 18 U.S.C. 242 (which derives from Section 17 of the 1870 Act) could also be covered by the broader and more general provisions of Section 241. 383 U.S. at 802, n. 11. In addition to the greater breadth of Section 241, the Court noted the differences in the sanctions provided for violations of the allegedly duplicative sections as a basis for rejection of the duplication argument. *Ibid.;* see *United States* v. *Williams,* 341 U.S. 70, 88, n. 2 (Douglas, J., dissenting). The same considerations apply here, since the sanctions for violation of Sections 19 or 20 of the Enforcement Act were more lenient that those for violation of Section 6 of that Act, the forerunner of Section 241. Compare Pet. Br. App. 4a–5a with *id.* at 5a–6a.

In sum, neither the specific treatment of voting fraud in other sections nor an earlier view of Congress' powers now recognized to be unduly narrow warrants the conclusion that Section 6 of the Enforcement Act, now Section 241, is inapplicable to a conspiracy utilizing state action to interfere, by means of casting false ballots, with the right to vote in state or local elections. This valuable right, no less than all

other rights secured by the Fourteenth Amendment, is within the broad coverage of the statute.

II. THE INDICTMENT IN THIS CASE SUFFICIENTLY ALLEGED ACTION "UNDER COLOR OF STATE LAW" BY PETITIONERS AND THEIR CO-CONSPIRATORS

The second question presented in this case (Pet. 2)[22]—whether the indictment was defective because it did not allege action under color of state law—does not arise if the Court agrees with our argument in point I A, *supra,* because there is indisputably no requirement of state action under Section 241 where the conspiracy is one to interfere with voting for candidates for Congress. *United States* v. *Classic, supra,* 313 U.S. at 315. Should this Court reach the question whether Section 241 applies to conspiracies to interfere with state elections (discussed in point IB, *supra*), however, it is our contention that the indictment in this case was adequate, under the standards previously applied by this Court, to allege action under color of state law.

[22] Much of petitioners' argument ostensibly related to the second question presented actually concerns assertedly erroneous evidentiary rulings (Pet. Br. 26, n. 29) and claimed deficiencies of the indictment other than the failure to allege that the petitioners acted under color of state law (Br. 23–26). Since these contentions go beyond, and are not fairly comprised within, the questions presented in the petition, we do not respond to them, other than to note that such of the contentions as were raised below were adequately discussed and properly rejected in the opinion of the court of appeals (*e.g.*, Pet. App. 2a–5a, 9a–11a, 16a–24a).

Although the indictment does not state *in haec verba* that petitioners acted "under color of state law" or that their activities involved "state action," it does, taken as a whole, sufficiently allege state action to bar dismissal. See *Guest, supra,* 383 U.S. at 754–757; cf. *Price, supra,* 383 U.S. at 799–800.[24] The indictment did allege that the conspiracy affected both federal and local vote results (see pp. 3, 12, *supra*), and embraced activities which necessarily involved state election officials (see Pet. App. 3b). Moreover, it alleged the office held by each of the petitioners (*id.* at 1b) and that they had acted together and with others to interfere with the right of qualified voters to have their votes given full and honest effect (*id.* at 3b). Together, these portions of the indictment sufficiently allege state action under the standards adopted by this Court in *Guest.*

Of course, the evidence adduced at trial showed that not only did petitioners conspire with local election officials to stuff the ballot boxes (see, pp. 5–8, *supra*), but also that petitioners Tomblin and Hager (Sheriff and Deputy Sheriff respectively) promised

[24] In *Guest*, for example, the indictment was held sufficient even though the only suggestion of state action was the allegation that one of the nine means by which the defendants (none of whom was said to be a public officer) had conspired to interfere with the exercise of constitutional rights was by "causing the arrest of Negroes by means of false reports that such Negroes had committed criminal acts * * *." 383 U.S. at 748 n. 1, 756.

favors,[25] threatened arrests and indictments, and did other acts of which they were capable only because of their official capacities (A. 37–38, 40, 47). The conspiracy was thus shown to involve sufficient state action to sustain a conviction under Section 241 for improper dilution of votes at a local election.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[25] The promises included appointment of Cecil Elswick to the job of deputy sheriff (A. 40–42, 48–49); help in Calvin Napier's marital troubles because they knew the judge (A. 24); and business for Garrett Sullins who was running for justice of the peace (A. 36).

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